Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
BellSouth Emergency Petition For Declaratory Ruling And Preemption Of State Action	)	**WC Docket No. 04-245**

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Pursuant to the Commission's Public Notice, DA 04-2028, issued on July 6, 2004, AT&T Corp ("AT&T") hereby submits its comments on the Emergency Petition For Declaratory Ruling And Preemption Of State Action ("Pet.") submitted by BellSouth Telecommunications, Inc. ("BellSouth").

INTRODUCTION AND SUMMARY

BellSouth asks the Commission to preempt a state commission from resolving disputes over the prices for network elements that BellSouth offers as a continuing condition of its section 271 in-region, interLATA authority. BellSouth does not contend that such state action could create a barrier to entry that could justify the Commission's exercise of its express Section 253 preemption authority. BellSouth instead claims that conflict preemption is justified here because state price-setting would "thwart or frustrate" federal policy, namely the Commission's determination that a Bell Operating Company complies with section 271 if competitive checklist items not unbundled pursuant to section 251 are offered at rates that comply with the "just, reasonable and [non]discriminatory" rate standard embodied in Sections 201 and 202 of the Act. Pet. at 13.

There is absolutely no need – or legal basis – for the relief that BellSouth seeks. BellSouth concedes that in the Tennessee arbitration decision that prompted it to file its Petition, the state commission has committed that it will, in ongoing state proceedings, apply the very just, reasonable and nondiscriminatory standard that the Commission has endorsed. *See* Pet. at 2. For this reason alone, BellSouth has failed to show that any legitimate federal purpose has been frustrated or thwarted.

But preemption would not be warranted even if BellSouth had shown that a state commission had actually set rates for section 271 checklist items that were, in BellSouth's view, much lower than the *maximum* just and reasonable rate that would allow BellSouth to retain its section 271 authority. That is because the federal interest under section 271 is simply to ensure that the local markets in a state are sufficiently open to warrant the Commission's authorization of a Bell's entry into the in-region, interLATA markets in the state. The Commission fulfills that federal interest by reviewing, among other things, the interconnection agreements that the state commission has approved and that the Bell has implemented. The Commission's federal interest under section 271 is to ensure that rates for checklist items are not too *high*, and there is absolutely no section 271 basis for a federal concern that these rates are too *low*. In short, a state commission setting prices for section 271 network elements does not "thwart or frustrate" any federal interest under section 271 so long as it does not set unjustly or unreasonably high rates (or rates that otherwise obstruct local competition), and no state has done that.

Moreover, BellSouth's Petition entirely ignores the express authority Congress provided to state commissions to set prices for elements unbundled pursuant to section 271. By its terms, section 271 expressly contemplates that the Bells will demonstrate compliance with the competitive checklist through interconnection agreements that the state commissions approve or

arbitrate. If a Bell wishes to remain in compliance with section 271 and cannot reach a negotiated agreement on the prices for items in the competitive checklist, then it is necessarily the case that state commissions will set those rates in arbitrations conducted pursuant to section 252. In fact, under that section, the state commission is *required* by the Act to resolve *any* "open" issues. Once a Bell agrees to provide section 271 checklist items – as it must if it wishes to retain interLATA authority – then the prices of those items, if not successfully negotiated, are, of necessity, unresolved issues that must be determined by state commissions in arbitration proceedings.

In truth, it is the preemption that BellSouth seeks that would "thwart or frustrate" federal policy. If new entrants cannot require the Bells to arbitrate section 271 checklist item pricing disputes, then the Bells will insist that new entrants accept unjust and unreasonable "market-based" prices for these items that would foreclose what little remaining competition the Bells face in local markets. But removing the state commissions as arbiters of disputes over pricing would not in fact reduce the number of disputes, as BellSouth claims. Rather, it would only require the Commission to decide them, either on an expedited 90-day time frame, pursuant to section 271 enforcement complaints or in a rulemaking of general application.

FACTUAL BACKGROUND

Although it seeks sweeping preemption, BellSouth provides only a bare description of the section 252 arbitration proceeding conducted by the Tennessee Regulatory Authority ("TRA") that BellSouth claims prompted the petition. It is apparent from the record, however, that the TRA's proceedings are far from final.[1] Given that the proceedings are still ongoing and have not

[1] All that BellSouth provides is a transcript of a hearing held before the TRA. According to the docket sheet for that arbitration proceeding that is available on the TRA's website, no further action in the docket has been taken since that hearing. *See* http://www2.state.tn.us/tra/dockets/0300119.htm.

as yet resulted in a final interconnection agreement that BellSouth is obligated to follow, there clearly can be no harm or "emergency" that compels immediate action by the Commission.[2] At a minimum, the Commission should not take any action until these proceedings are, in fact, final and the full record is presented to the Commission.[3]

BellSouth provides no information regarding any negotiations that it conducted with ITC^DeltaCom prior to the arbitration. Nevertheless, from the limited record provided by BellSouth, it is evident that the parties had a *bona fide* dispute regarding the proper rates, terms, and conditions for unbundled switching that BellSouth indisputably offered to provide pursuant to section 271. *See* Pet. at 2. DeltaCom made a "final best offer" of a rate that would apply to section 271 switching, and BellSouth made a different offer, claming that it would provide switching at what BellSouth calls "market-based prices." *Id.* at 2, 4. BellSouth asserts that it disputed that the TRA had authority to decide the appropriate rate for switching, but BellSouth did not contest that it was obligated – as a condition of its authorization into the long distance market in Tennessee – to offer ITC^DeltaCom access to unbundled switching pursuant to section 271. *See id.* at 3.

Consistent with its obligations under section 252 to resolve all unresolved issues in the arbitration on the basis of the best evidence put forward by the parties, 47 U.S.C.

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[2] According to the transcript, the TRA also apparently intends to open a "generic" docket that addresses the issue of pricing of switching that BellSouth provides pursuant to section 271. *See* Pet. at 4-5. BellSouth does not contend that the use of such a generic docket is improper to determine rates that the TRA would then adopt in subsequent arbitrations conducted pursuant to 252. Under the Act, a state commission has the flexibility to "consolidate proceedings" in this manner in order to "carry[] out its responsibilities under the [Act]." 47 U.S.C. § 252(g).

[3] Even more speculative are the claims BellSouth makes regarding petitions for arbitration that Covad has filed. As to these actions, BellSouth admits that "no state commission has acted on these petitions yet." Pet. at 1 n.1. There is obviously no cognizable harm to BellSouth by virtue of the fact that it must comply with its duties to arbitrate disputes pursuant to § 252.

§§ 252(b)(4)(B)-(C), the TRA appears to have resolved this issue by adopting ITC^DeltaCom's proposed rate as an *interim* rate *subject to true-up*. *See* Pet. at 4. The TRA, like the Commission, determined that the rate for switching provided pursuant to section 271 should be based on a "just and reasonable" standard, and the TRA found that BellSouth had not shown that its proposed rate was just and reasonable under the very pricing standard that BellSouth believes to be controlling. *Id.* at 4 n.3. Specifically, the TRA indicated that BellSouth had not shown that its proposed rate is "at or below the rate at which BellSouth offers comparable functions to similarly situated purchasing carriers" or was based on "arm's length agreements with other similarly situated purchasing carriers." *Id.* In order to set a permanent rate that would apply, the TRA indicated that it would open a generic docket. *Id.* at 4-5.

I. SECTION 271 DOES NOT OUST STATE COMMISSIONS OF JURISDICTION.

BellSouth's Petition is based on a fundamentally flawed view of the Act and particularly of section 271. Under BellSouth's view, section 271 somehow operates to oust state commissions of all existing rate-setting authority – state and federal – such that the Commission is the *exclusive* entity to set, in each state, the rates, terms, and conditions for all of the items in the competitive checklist that are not unbundled under section 251. *See* Pet. at 1. Neither the terms nor the purposes of section 271 support BellSouth's position. Section 271 provides that the Commission is the exclusive arbiter of a Bell company's *application* to provide in-region, interLATA service in a state, 47 U.S.C. § 271(d)(3), but it nowhere provides the Commission with exclusive ratemaking authority over services provided pursuant to the competitive checklist or preempts state commissions from exercising authority they otherwise have been granted under federal or state law. The fact that the ultimate determinations of a Bell's compliance with section 271 are made exclusively by the Commission by no means ousts state commissions from setting the rates and conditions for § 271 network elements in the first instance.

A. The Commission's Exclusive Authority Under § 271 To Review Applications And To Enforce § 271 Requires The Commission To Apply Minimum Federal Standards That The Bells Must Satisfy, Not To Set Particular Rates and Conditions For Competitive Checklist Items.

Although the 1996 Act in part "federalizes regulation of the [local] telecommunications field in the name of competition," the Act "recognizes and specifically preserves state authority to continue to regulate locally, as long as the regulations promote, and do not conflict with, the stated goals and requirements of the Act on its face or as interpreted by the FCC."[4] Thus, the 1996 Act – which is "an exercise in what has been termed cooperative federalism," *Puerto Rico Tel. Co.* v. *Telecomm. Bd. of P.R.*, 189 F.3d 1, 8 (1st Cir. 1999) – adopts minimum federal requirements that set a "floor below which . . . [a state] may not go" and that permit the states to adopt additional procompetitive requirements under state law.[5]

Section 271 is entirely consistent with this general structure, and does not oust states of jurisdiction. Contrary to BellSouth's claims, nothing in section 271 provides the Commission with sweeping and exclusive jurisdiction over each particular rate, term, and condition for all of the checklist items that the Bells are obligated to provide under section 271. *See WorldCom, Inc.* v. *FCC*, 308 F.3d 1, 7 (D.C. Cir. 2002) (it is not reasonable to "expect the § 271 process to grow into a full-scale ratemaking on the part of the FCC"). Rather, the Commission's role under

[4] *Indiana Bell Tel. Co.* v. *McCarty*, 362 F.3d 378, 392 (7th Cir. 2004); *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 385 n.10 (1999) (Congress has extended federal "law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions").

[5] *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 806-07, 812 (8th Cir. 1997) (subsequent history omitted); *See McCarty*, 362 F.3d at 392 ("[b]ased on the plain language of the Act, it's clear" that state commissions have "independent authority preserved under the Act" to impose additional pro-competitive requirements). The Commission has likewise described the basic scheme under the Act as a state-federal partnership in which "the FCC establishes uniform, national rules for some issues, the states and the FCC administer these rules, and the states adopt other critically important rules to promote competition." *Local Competition Order*, 11 FCC Rcd. 15499, ¶ 53 (1996); *see id.* ¶¶ 60, 310.

section 271 is to examine competitive conditions in a state's local markets, including the interconnection agreements that the state commission has approved and that the Bell has implemented, and to determine whether the Bell has met all of the conditions of the checklist and whether local competition in the state is sufficiently developed so that Bell entry into interLATA markets meets the public interest.[6]

Under section 271, therefore, all that the Commission is concerned with is whether these minimum conditions of section 271 are satisfied (and continue to be satisfied), so that the Bell may properly be authorized to provide in-region, interLATA services in the state. As the Commission has repeatedly stressed, in making its inquiries pursuant to section 271, it is indifferent to the particular rates for individual checklist items that have been developed in a state, so long as those rates are not shown to be so high as to exceed the upper bounds of the federal rate standard. Not surprisingly, then, the Commission did not undertake the task of setting particular and specific rates for the competitive checklist items when reviewing section 271 applications.[7] Rather, the Commission merely reviewed the rates that state commissions set for compliance with minimum federal standards, and it approved applications even though rates for local services varied tremendously from state to state. *See*, *e.g.*, *Sprint Comm*, 274 F.3d at 552 (finding that a section 271 application for Kansas complied with the checklist even though some charges "remain significantly higher in Kansas than in Texas"); *California 271 Order* ¶ 64

[6] *See*, *e.g.*, *AT&T Corp.* v. *FCC*, 220 F.3d 607, 631-32 (D.C. Cir. 2000) (a section 271 proceeding is "focused on an individual applicant's performance" and the Commission's "judgement about the current state of competition in local markets").

[7] *See Sprint Comm. Co.* v. *FCC*, 274 F.3d 549, 556 (D.C. Cir. 2001) ("When the Commission adjudicates § 271 applications, it does not – and cannot – conduct de novo review of state rate-setting determinations"); *AT&T Corp*, 220 F.3d at 615 ("The FCC does not conduct de novo review of state pricing determinations in section 271 proceedings, nor does it adjust rates . . ."); *California 271 Order*, 17 FCC Rcd. 25650, ¶ 41 ("we perform our section 271 analysis based on the rates before us").

(finding that, under the Commission's "benchmarking" approach, a 30 percent difference between loop rates in two states is acceptable to show compliance).[8]

The fact that a particular network element might no longer be required to be unbundled pursuant to section 251 does not change the Commission's role under section 271. Regardless, the Commission has no federal interest under section 271 in reviewing claims, like the one raised here by BellSouth, that a state commission, in conducting an arbitration pursuant to section 252, has approved a rate for a competitive checklist item that is purportedly too *low*. Certainly, the Commission does not have *exclusive* jurisdiction to set rates for section 271 elements, as BellSouth asserts. Rather, the Commission's jurisdiction relates to reviewing section 271 applications and then enforcing section 271 when a Bell is not in compliance with (or falls out of compliance with) section 271 because, *inter alia*, the rates for local services that it provides are too *high* to permit local competition.

B. The Commission's Determination That Competitive Checklist Items Must Be Offered Consistent With Sections 201 and 202 Sets The Minimum Federal Standards, But Does Not Oust State Commissions From Setting Particular Rates At The Lower End Of The Just And Reasonable Range.

BellSouth also claims that the Commission has already made "clear pronouncements" that "state commissions have no authority under section 271 to regulate elements provided only pursuant to section 271." Pet. at 1; *id*. at 10. BellSouth relies on the holding of the Commission's *Triennial Review Order*, 18 FCC Rcd. 16978 (2003) ("*TRO*"), that, for § 271 checklist items not required to be unbundled under § 251, a Bell is obligated to offer prices,

[8] In most cases, the Commission was reviewing rates that were set for network elements unbundled pursuant to section 251 and that were priced using a TELRIC methodology. Whatever the standard that might be applied in reviewing competitive checklist compliance absent section 251 unbundling, the *process* employed by the Commission to review section 271 applications would not be different. In either case, the Commission would look to the state commissions to set particular rates and terms, with the Commission conducting a review to ensure those terms met with minimum federal standards.

terms, and conditions for checklist items that meet the "just, reasonable and nondiscriminatory" standards contained in sections 201 and 202 of the Act. *Id.* ¶¶ 656-64.

But all that the Commission did in the *TRO*, consistent with its role under section 271 described above (*see supra* part I.A), is to announce that section 201 and 202 provide the minimum federal requirements that Bells must meet to continue to comply with section 271. *See TRO* ¶¶ 653-55. That pronouncement, however, neither provides the Commission with exclusive authority to apply the standards of sections 201 and 202 nor precludes state commissions from applying non-confiscatory rate standards that may produce lower rates.

Contrary to BellSouth's claim, the Commission nowhere stated in the *TRO* that it would have exclusive jurisdiction in setting rates for facilities that are unbundled pursuant to § 271. In fact, the Commission expressly recognized that the "just, reasonable, and nondiscriminatory rate standard" found in §§ 201 and 202 was "fundamental" to common carrier regulation and has "historically been applied under most federal *and state* statutes." *Id.* ¶ 663 (emphasis added). The Commission therefore recognized that states have expertise and experience in applying, under state law, the same standards found in §§ 201 and 202, and it is well-established that "state officers may interpret and apply federal law." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 385 n.10 (citing *United States* v. *Jones*, 109 U.S. 513 (1883)). Accordingly, nothing in the *TRO* can be read to suggest that states cannot apply the just, reasonable, and nondiscriminatory standard to determine the prices, terms and conditions for § 271 unbundling. Indeed, just as states apply federal pricing standards for network elements unbundled pursuant to section 251 and 252, *Iowa Utils. Bd.*, 525 U.S. at 384, they can perform the same role with respect to section 271. *See id.* at 385 n.10.

Here, it is all the more appropriate for state commissions to determine in the first instance specific prices and terms for § 271 checklist items because these facilities are predominantly used to provide intrastate services that are traditionally within the states' exclusive jurisdiction.[9] Particularly given the Act's many state law savings clauses, it would be nonsensical to read the Act as entirely divesting the states of jurisdiction to regulate these intrastate services merely because rates are now subject to a federal "just, reasonable, and nondiscriminatory" rate cap. *See, e.g.,* 47 U.S.C. §§ 252(e)(3); 261(c), 601(c); *AT&T Comm. of Ill., Inc.* v. *Illinois Bell Tel. Co.*, 349 F.3d 402, 410 (7th Cir. 2003) (Section 601(c) "precludes a reading that ousts the state legislature by implication").

BellSouth points to the Commission's statements that application of the §§ 201 and 202 standards to a particular rate is a "fact-specific inquiry that *the Commission* will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)." *TRO* ¶ 664 (emphasis added). All that this means, however, is that the Commission retains ultimate authority to make a determination pursuant to § 271(d)(6) whether a particular rate charged by the Bell is so high (as judged by the §§ 201 and 202 standards) that the Bell can no longer be deemed to be in compliance with the § 271 requirements. The *TRO* language does not indicate that the Commission would set in the first instance all of these rates in all of the Bell states, or that the states would be preempted from setting rates.

Moreover, although the Commission ruled in the *TRO* that the section 201 and 202 just, reasonable, and nondiscriminatory standards will generally apply, this rule – like other FCC

[9] Accordingly, the cases cited by BellSouth (Pet. at 10) holding that Congress entrusted the Commission with the authority to determine what is just, reasonable, and nondiscriminatory under sections 201 and 202 are simply not applicable here, because those cases involved interstate services.

regulations under the Act – operates as a floor that established a maximum rate and not a ceiling. *See, e.g.*, 47 U.S.C. §§ 251(d)(3), 252(e)(3) & 261. Although a state is required by section 252(c)(1) to ensure that its arbitration rulings meet the requirements of section 251, including "the regulations prescribed by the [FCC] pursuant to section 251," the rule in the *TRO* applying §§ 201 and 202 to § 271 checklist items was *not* adopted pursuant to § 251. Thus, nothing in the *TRO* prevents a state from applying other pricing standards to § 271 checklist elements. For example, although the TRA did not here adopt such an approach, nothing prevents the states from adopting forward-looking economic cost approaches, such as the TELRIC methodology that the Commission and the Supreme Court have already determined produces just and reasonable rates. *See Local Competition Order* ¶ 738; *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467 (2002). At the same time, however, a state could not establish a rate pursuant to state law that produced rates *higher* than a just and reasonable rate, because that would directly conflict with the FCC's rule in the *TRO*.

Under these principles, a state could, at least initially, set rates for section 271 checklist elements either under federal law (*i.e.*, §§ 201 and 202) or under a state law that does not establish rates that are higher than the just and reasonable federal law standard. However, the FCC has jurisdiction under section 271(d)(6) regarding compliance with the section 271 checklist items, and it could invoke that jurisdiction to find that a particular rate is too high to be consistent with the federal section 201 and 202 standards and that a Bell charging such a rate is therefore not in compliance with section 271.[10]

[10] In fact, as the D.C. Circuit has recognized, in reviewing the public interest standards of section 271, the Commission must respond to evidence that the Bells' rates for checklist items are not so high that they effect price squeezes on competitors. *See, e.g.*, *Sprint Comm.*, 274 F.3d at 554-55. The court recognized that there is a "wide zone of reasonableness" and that even rates within that "just and reasonable" zone may nonetheless be at "too high a point within the band" to comply with section 271. *Id.* (citing *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976)).

C. Section 271 Expressly Contemplates That Bells Will Comply With The Competitive Checklist Through Interconnection Agreements Approved or Arbitrated By State Commissions

BellSouth's claims (Pet. at 7) that Congress provided states only "a consultative role" under section 271 is also flatly incorrect. In fact, the text of section 271 demonstrates that Congress fully expected that state commissions would in the first instance set the particular prices for competitive checklist items. Under the terms of § 271(c)(1)(A) and § 271(c)(2)(A), which is entitled "Agreement required," an express condition that a Bell must meet in order to offer in-region, interLATA services in a state is that it provide the competitive checklist items (§ 271(c)(2)(B)) through "binding agreements that have been approved *under section 252*." 47 U.S.C. §§ 271(c)(1)(A); 271(c)(2)(A). Where negotiations fail, it is the state commissions that must conduct arbitrations pursuant to section 252 to form an interconnection agreement that can be approved "under section 252." A Bell can thus comply with its § 271 duties *only* by entering into interconnection agreements "under section 252" (§ 271(c)(1)(A)) that specify terms and conditions for the § 271 checklist items.[11] In arbitrating interconnection agreements, state commissions plainly will set in the first instance the rates, terms, and conditions for § 271 checklist items. *See Sprint*, 274 F.3d at 552 (noting that the competitive checklist requirements are "enforced by state regulatory commissions pursuant to § 252").

Further, the Commission has also always recognized that it is essential that Bells demonstrate compliance with section 271 through binding and lawful section 252 interconnection agreements that contain specific terms and conditions implementing the

[11] A Bell must demonstrate compliance with section 271 using interconnection agreements in every state in which it has received a "qualifying request" pursuant to "Track A" of section 271. Because the Bells have received qualifying requests in every state, a Bell is not permitted to rely on a state-approved "SGAT" to demonstrate compliance with section 271. And, in all events, it is the state commissions that must approve the rates and terms of SGAT. *See* 47 U.S.C. § 252(f).

competitive checklist. For example, the Commission has dismissed section 271 applications and determined that a Bell fails to comply with the checklist if it relies on an agreement that is not in fact binding and is not approved by the state commission.[12] The Commission has also made clear that when a competitive LEC requests a particular checklist item, a Bell "is providing" that item and complies with § 271(c)(2)(A) only if it has a "concrete and specific legal obligation to furnish the item upon request *pursuant to state-approved interconnection agreements that set forth prices* and other terms and conditions." *Michigan 271 Order* ¶ 110 (emphasis added).

Accordingly, in order for the Bells to come into – and to remain in – compliance with the section 271 checklist, they are required to negotiate and then arbitrate interconnection agreements before state commissions that contain terms and conditions for each of the section 271 checklist items. If a Bell refuses to do so and thus does not enter into binding interconnection agreements under section 252 regarding the section 271 network elements listed in the checklist, then the Bell would plainly have "cease[d] to meet" one of the essential conditions of § 271, § 271(d)(6); *see* § 271(c)(2)(A) (entitled "Agreement *required*").

II. STATE COMMISSIONS ARE PERMITTED TO SET PRICES AND TERMS FOR § 271 ELEMENTS PURSUANT TO FEDERAL AND STATE LAW.

BellSouth's Petition not only fundamentally misreads section 271 to oust the state commissions of jurisdiction, but ignores the authority states *are* given under the Act and have retained pursuant to state law to set rates for checklist items. In particular, in the arbitration proceedings before the TRA that prompted BellSouth's petition, it is clear that the TRA was acting properly to decide an "unresolved" issue in an arbitration – actions that section 252 of the

[12] *See, e.g., Application of Ameritech Michigan*, 12 FCC Rcd. 3309, ¶ 22 (1997); *see also Michigan 271 Order*, 12 FCC Rcd. 20543, ¶¶ 25, 71 (1997).

Act *requires* state commissions to take. 47 U.S.C. § 252(b)(4)(C). The TRA could hardly have violated the Act in fulfilling the duties Congress placed on it.

Similarly, and even if an issue is not contested between the parties to an arbitration, Congress expressly preserved state commissions' authority under state law and allowed them to establish and enforce state law requirements in interconnection agreements, even if those state requirements exceed federal law minimum standards. 47 U.S.C. § 252(e)(3); *McCarty*, 362 F.3d at 391-93. Section 252(e)(3) of the Act thus explicitly provides that a state commission can "establish[] or enforc[e] other requirements of State law in its review of an agreement." 47 U.S.C. § 252(e)(3); *see also id.* §§ 251(d)(2), 261. Under this authority, states clearly can set rates, terms, and conditions for checklist items not unbundled pursuant to section 251, so long as they obey minimum federal law requirements and do not set rates that exceed just and reasonable levels.

A. A State Commission Is Required By Section 252 Of The Act To Resolve All Open Issues.

Congress provided that, when conducting arbitration proceedings instituted pursuant to section 252, state commissions "shall resolve each issue set forth in the petition [for arbitration] and the response." 47 U.S.C. § 252(b)(4)(C). Thus, when a party seeks arbitration, it first must provide documentation concerning "the unresolved issues," which then become subject to arbitration before the state commission. *Id*. § 252(b)(2)(A)(i). It is these "unresolved" issues between the parties that the state commissions must decide under the procedures and timeframes specified in section 252. And, as described above, *see supra* Part I.C, the Act expressly contemplates that the unresolved issues to be decided in section 252 arbitrations would include determinations regarding the rates, terms, and conditions of section 271 checklist items.

This is precisely what the TRA did in the proceedings that prompted BellSouth's petition. ITC^DeltaCom petitioned for arbitration of unresolved issues, one of which was "what should be the rate" for local switching that BellSouth provides pursuant to the competitive checklist in section 271. Pet. at 2 (describing "Issue 26 of the Parties' issues list"). ITC^DeltaCom provided a "final best offer" for switching, and BellSouth responded, claiming that it would provide switching pursuant to the checklist but at a so-called "market-based" rate that BellSouth, and not the TRA, would determine. *See* Pet. at 2-3. Because there was obviously a *bona fide* dispute as to what the rate "should be," the TRA determined this unresolved issue on the best evidence available to it, as it was required to do under the Act. *Id.* at 4.

BellSouth nonetheless claims that the TRA had no authority to decide this unresolved issue and should have declined to do so. Pet. at 7-8. According to BellSouth, section 252 limits state commissions' authority in conducting arbitration proceedings to the "implementation of section 251 obligations" and BellSouth contends that the fact that there is no federal rule requiring access to the element at issue here (switching for customer locations with more than four lines) means that the rights for this element are both outside sections 251(b) and 251(c) and outside state authority under § 252. *Id.* at 8. But the fact that section 252 of the Act provides that a state commission is to ensure that its determinations of unresolved issues in an arbitration "meet the requirements of section 251" (§ 252(c)(1)) does not mean, as BellSouth contends (Pet. at 7), that the state commission's role under section 252 in conducting arbitrations is limited to making sure that an interconnection agreement meets the minimum federal requirements in the FCC's regulations under § 251. Rather, state commissions are authorized to decide – indeed, must determine – all "open issues" in a section 252 arbitration proceeding, including issues of

state law and section 271 checklist items. § 252(b)(4)(C).[13] State authority would thus extend to determining the rates for the elements at issue even if it were the case (as it is not) that the absence of a federal rule mandating access to an element means that the issue of the rate for the element is outside sections 251(b) and (c).

Federal courts have uniformly so held. For example, the 5th Circuit reversed a state commission's reasoning for refusing to arbitrate an issue in these circumstances. *See Coserv Ltd. Liability Corp.* v. *Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003). It held that a state commission "err[s]" whenever it "narrowly" interprets § 252 to permit the state commission to decide only issues related to § 251(b) and (c). *Id.* at 486, 488. Rather, in seeking to reach an interconnection agreement, the "parties are free to include interconnection issues that are not listed in § 251(b) and (c) in their negotiations. . . . . [N]othing in § 252(b)(1) limit[s] open issues only to those listed in § 251(b) and (c)." *Id.* at 487. As the 5th Circuit found, Congress expected that negotiations initiated pursuant to § 252 might expand to include "other issues" that would be "link[ed] . . . together under the § 252 framework," and Congress "still provided that *any issue* left open after unsuccessful negotiation would be subject to arbitration." *Id.* Accordingly, the Court concluded that, where the "parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration." *Id.*; *accord MCI Telecom. Corp.* v. *BellSouth Telecom. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (recognizing that state commissions can decide issues that the parties agree to negotiate).

[13] Contrary to BellSouth's view, Congress did not "intend the [section 271] competitive checklist to be a *limitation* on the interconnection requirements contained in section 251." S. Rep. 104-23, 104th Cong, 1st Sess., p. 43 (March 30, 1995) (emphasis added). "Rather," the competitive checklist "set[s] forth what must, at a minimum, be provided [upon request] by a Bell operating company in *any* interconnection agreement approved under section 251 to which that company is a party." *Id.* (emphasis added).

On the facts presented by BellSouth, the rates for switching and other competitive checklist items that BellSouth makes available pursuant to section 271 are clearly issues that the parties have voluntarily included in their negotiations in Tennessee and other states. Indeed, it is undisputed that, before the TRA, BellSouth agreed that it would offer switching pursuant to section 271, and the only issue that was unresolved was the appropriate rate. *See* Pet. at 2. And it is obvious why BellSouth agreed to offer switching. If it refused to do so, it would no longer meet one of the conditions required for BellSouth to offer long distance services in Tennessee and the Commission would be required to suspend or revoke BellSouth's long distance authority. 47 U.S.C. § 271(d)(6).[14]

BellSouth's position that it has not voluntarily negotiated the appropriate terms for switching provided pursuant to section 271 is incoherent. BellSouth has willingly offered to provide switching pursuant to section 271, but, rather than negotiate a price, takes the position that it will unilaterally determine what is the "market-based" rate. Pet. at 2. But the fact that BellSouth has taken an unreasonable and unyielding negotiation position as to pricing does not mean that it has refused to negotiate the issue. Rather, the necessary implication of its decision to offer to provide unbundled switching pursuant to section 271 is that it must also negotiate and, if the requesting carrier does not agree, arbitrate the appropriate rate. Accordingly, the TRA

[14] As described above (*see supra* Part I.C) and as the *Coserv* decision confirms, BellSouth, by seeking to provide in-region, interLATA services, has voluntarily agreed to negotiate – and thus to arbitrate where negotiations fail – interconnection agreements that contain the § 271 checklist items. Such interconnection agreements are the only route to meeting the section 271 requirement that a Bell shall demonstrate compliance with the competitive checklist through "binding agreements that have been approved *under section 252*." 47 U.S.C. § 271(c)(1)(A). Having agreed to negotiate items in the competitive checklist, BellSouth has, as *Coserv* holds, subjected itself to section 252 arbitration. *Coserv*, 350 F.3d at 487. If BellSouth wishes to refuse to negotiate those issues, then it must voluntarily end its in-region, interLATA services. Unless and until it does, it is bound by the conditions – including negotiation and arbitration of the section 271 checklist unbundling requirements under section 252 – that it accepted when it sought interLATA authority.

acted properly in determining this "unresolved" issue in the arbitration proceedings it conducted pursuant to section 252.

B. State Commissions Can Rely On State Law To Establish Terms For Checklist Items In Interconnection Agreements.

In addition to the authority state commissions have to determine "unresolved" issues in an arbitration, section 252(e)(3) makes it explicit that, subject to § 253, "*nothing* in" § 252 – including, for example, the provisions in § 252(b)(4)(A) providing that state commissions must limit its arbitration proceeding to the issues raised by the arbitration petition – "shall prohibit a State commission from establishing or enforcing other requirements of state law *in its review of an agreement*." 47 U.S.C. § 252(e)(3) (emphasis added). Thus, regardless of the open issues presented by the parties to an arbitration or the scope of an incumbent LEC's duty to negotiate, Congress unmistakably provided that, during the course of serving as an arbitrator under § 252, a state commission is always entitled to establish or enforce pro-competitive state law requirements in an interconnection agreement in addition to implementing federal requirements.[15] With respect to checklist items that the Bells make available pursuant to section 271 but not 251, the states clearly retain authority under state law to set particular prices for these items.

[15] Once again, the decision in *Coserv* also makes clear that BellSouth can be required by state law to negotiate and arbitrate issues that fall outside the scope of § 251(c), including the terms and conditions applicable to § 271 network elements that are not subject to unbundling by the FCC under § 251(d)(2). *See Coserv*, 350 F.3d at 488 (if an issue is not subject to arbitration pursuant to § 252, it can "become subject to appropriate state remedies;" these "other issues" can then be "link[ed] . . . together under the § 252 framework"). Thus, even if an incumbent LEC has no duty to negotiate an issue under federal law, it can be required to do so under state law.

III. REMOVING THE STATE COMMISSIONS AS ARBITERS OF DISPUTES OVER PRICING WOULD NOT REDUCE PRICING DISPUTES.

BellSouth apparently believes that, if the Commission attempts to preempt the state commissions, then it will "leav[e] . . . room for . . . commercial negotiations" between BellSouth and new entrants. Pet. at 14. But the Act already leaves ample room for the parties to negotiate rates pursuant to interconnection agreements. *See* 47 U.S.C. § 252(a)(1). And, as the dominant provider of local services, BellSouth and the other incumbent LECs have absolutely no incentives to negotiate reasonable rates for section 271 checklist items that are not also required under section 251 – particularly since all of the Bells have already been granted interLATA authority, which was one of the Act's principal incentives for the Bells to comply with their market-opening obligations.[16] Accordingly, if the Commission attempts to pre-empt state commissions from exercising their authority to set rates for checklist items, it would not encourage negotiated solutions; rather, it would, in fact, only further discourage the Bells from participating in good faith negotiation.

Ultimately, in order to prevent the Bells from stifling local competition by shirking their section 271 duties, new entrants, if denied the opportunity to arbitrate these issues before state commissions, would be forced to file a flood of complaints at the Commission pursuant to section 271(d)(6) of the Act – which requires complete resolution of such complaints in *90 days*. *See* 47 U.S.C. § 271(d)(6). BellSouth claims that the Commission's complaint proceedings would provide the *only* forum for new entrants to challenge rates that the Bells would provide under section 271. Pet. at 13 n.14. Thus, the practical effect of BellSouth's Petition, if granted,

[16] *See Local Competition Order* ¶ 55 ("We find that incumbent LECs have no economic incentive, independent of the incentives set forth in section 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services").

would be to force the Commission to set rates, on an expedited basis, in each of the states and for each of the items that Bells must provide under the competitive checklist. Alternatively, the Commission would need to address the same issues in a rulemaking of general application.

CONCLUSION

For the foregoing reasons, BellSouth's Emergency Petition should be denied.

Respectfully submitted,

/s/ David W. Carpenter

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July 30, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2004, I caused true and correct copies of the forgoing Comments of AT&T to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: July 30, 2004
Washington, D.C.

/s/ Peter M. Andros

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